JUDGE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLARK LANDIS, ROBERT BARKER, GRADY THOMPSON, and KAYLA BROWN, Plaintiffs, v. WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM PUBLIC FACILITIES DISTRICT; BASEBALL OF SEATTLE, INC., a Washington corporation; MARINERS BASEBALL, LLC, a Washington limited liability company; and THE BASEBALL CLUB OF SEATTLE, LLLP, a Washington limited liability limited partnership, Defendants.	No. 2:18-cv-01512-BJR **PLAINTIFFS' RESPONSE TO DEFENDANTS' OMNIBUS MOTIONS IN LIMINE**

I. RESPONSE

Plaintiffs submit the following response to Defendants' omnibus motions in limine:

1. Defendants' motion in limine #1 should be denied because Plaintiffs' expert Mr. Terry should be permitted to rebut Defendants' potential arguments that solutions are not possible to the design insufficiencies at issue in this case.

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2. Defendants' motion in limine #2 should be denied because the exhibits Defendants seek to exclude did not exist at the time of the exchange of Initial Disclosures; are not outstanding to any other discovery requests because Defendants did not propound any requests for production; and are not prejudicial to Defendants because the exhibits are merely pictures of areas that Defendants also have access to, and foundational issues will be addressed in the normal course of exhibit admittance.

3. Defendants' motion in limine #3 should be denied because it is an unnecessary restatement of the rules on expert testimony and does not identify any specific expert testimony to be excluded. Plaintiffs agree that their expert testimony will comply with the Rules of Evidence.

4. Defendants' motion in limine #4 should be denied because it is another unnecessary restatement of the rules of evidence that does not identify what specifically Defendants seek to exclude. Furthermore, while any witness cannot supply foundational testimony for documents provided by counsel, merely because a document was supplied to a witness by counsel does not mean a witness should be precluded from testifying about how the facts in the document would affect them.

5. Defendants' motion in limine #5 should be denied because Defendants are properly on notice regarding the claims asserted as they were at issue in Plaintiffs' Motion for Summary Judgment. Defendants' motion in limine on this issue attempts to be a procedural back-door to preclude these claims from being determined on their merits.

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6. Defendants' motion in limine #6 should be denied because Plaintiffs have claims for damages, so as a threshold matter Plaintiffs should be permitted to present evidence supporting the claim.

II. AUTHORITY

1) Plaintiffs' Expert Should Be Permitted To Opine On Generic Solutions And To Rebut Arguments That No Solutions Are Possible.

Plaintiffs' expert report did not address specific remedial measures to be applied at T-Mobile Park. However, this should not preclude him from testifying about general solutions to similar problems at other parks. As an expert, Mr. Terry is well-versed on situations and factual histories of other parks. Testimony he offers on historical remediation is admissible under Federal Rule of Evidence 702(a), being "specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Moreover, Defendants were given the opportunity to question Mr. Terry on his knowledge of general potential remediation during his deposition, and did so. [Campos Dec., Ex. 1: Terry Dep., 68-70].

Additionally, Mr. Terry should be permitted to offer testimony rebutting, if made, assertions that any particular remediation is not feasible, technically infeasible, or is not readily achievable. Defendants' expert, Mr. Endelman, did not address the feasibility of any specific remediation either. [Campos Dec., Ex. 2: Endelman Report, at 11-12]. If Defendants make the argument that any remedy "can't be done," Mr. Terry should be able to testify based on his knowledge and experience whether a similar remedy has been done elsewhere.

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2) Exhibits Produced as Supplemental Initial Disclosures Should Be Permitted Because Their Late Disclosure Is Both Substantially Justified And Harmless.

Plaintiffs identified and produced a small set of photos taken at a series of games at T-Mobile Park to be used as exhibits at trial. These pictures are certainly relevant in the case, as central to issues in dispute are attendees' experiences during games. Defendants cite Fed. R. Civ. P. 26, the Rule on Initial Disclosures, to argue the exhibits should be precluded.

Plaintiffs did not supply the documents by the December 24, 2018, Initial Disclosure cutoff because the documents did not exist on December 24, 2018. Similarly, the documents did not exist by the Discovery Cutoff of April 16, 2019. [Dkt. 14]. The documents are pictures taken at games in May, June, and August of 2019. Plaintiffs referred to them as "Initial Disclosures" only because Defendants did not propound any Requests for Production and so they were not supplemental responses. Plaintiffs took these pictures after issues were clarified during motions practice, and which Plaintiffs disclosed after realizing they intended to use them at trial. Plaintiffs were substantially justified in not producing them previously. This situation is completely unlike *Melczer v. Unum Life Ins. Co. of Am.*, 259 F.R.D. 433, 435 (D. Ariz. 2009), cited by Defendants, in which a party failed to produce a multitude of *existing* documents by the discovery deadline.

Defendants are not harmed by Plaintiffs late disclosure for two reasons. First, the documents are pictures of spaces and configurations that Defendants have easy access to (that is, at T-Mobile Park). There is no one-sided secret knowledge contained in these pictures; they merely clarify some of the issues in the case. Defendants at any time could have visited the stadium and taken their own pictures to support their positions.

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Second, contrary to Defendants' argument, there is no need for further discovery regarding the photographs (further distinguishing this situation from Melczer, where the production consisted of 526 pages of documents which presumably required authentication, explanation, etc). Defendants identify the need to "propound written discovery and/or conduct depositions to understand how these documents were created and what they purport to represent." [Omnibus Motion, at 7, Dkt. 36]. This is an interesting position for Defendants to take, since they did not propound discovery on any other issue.[1] It hardly seems necessary to reopen discovery for photos and videos taken at Defendants' stadium.

3) Expert Testimony Should Be Addressed As It Arises.

By their motion in limine #3, Defendants move to exclude Plaintiffs' expert witness, Mr. Terry, from making legal conclusions at trial. Defendants do not identify any specific testimony that Mr. Terry has made, or even what they expect him to testify to, that would constitute a legal conclusion.

This motion is premature. Plaintiffs agree that expert testimony is governed by ER 704, and assert that their expert witness will comply with the rule. (Similarly, Plaintiffs expect Defendants' expert witness to comply as well). Should any testimony become an issue, it can be addressed at that time through objections.

[1] At the very least, if the Court determines too much of a delay between when the pictures were taken and when they were produced, the Court should permit the pictures taken on August 10, 2019, as it was only 9 days between when the pictures were taken and when they were produced.

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4) Lay Witnesses Can Testify About Their Own Knowledge.

Defendants argue that Plaintiff lay witnesses should be precluded from testifying about barriers they have not personally seen, and knowledge of which is only based on documents produced in litigation.

While Plaintiff lay witnesses cannot testify about matters they have not seen, if they have seen otherwise authenticated documents, they should be permitted to testify to their knowledge of the document and what it contains. Similarly, they should be permitted to testify about hypotheticals and comparable situations based on other experience (whether they can see over items of a certain height, etc.). Again, this issue is better addressed during trial as specifics arise.

5) Defendants Have Sufficient Notice Of The Claims At Issue In this Lawsuit.

With their motion in limine #5, Defendants attempt to accomplish by an evidentiary motion what should be accomplished by a motion for summary judgment: Defendants assert that Plaintiffs are bringing claims outside the scope of the complaint, identifying "for example" only two: food and drink surfaces throughout the stadium as opposed to only in the Pen and the 200 Level, and unequal companion seats. [Omnibus MIL, at 9-10, Dkt 36].

As an initial matter, both issues *were* adequately raised in the complaint. Plaintiffs' Second Cause of Action identifies as a violation of the ADA:

f. Failing to provide fully accessible concessions stands and dining areas;

[Complaint, at 22, Dkt. 1]. Elsewhere, the Complaint specifically takes issue with

- Failing to provide sufficient wheelchair accessible and companion seating sightlines;
- Failing to provide sufficient wheelchair accessible and companion seating dimensions and slope

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[Complaint, at 3, Dkt. 1]. Furthermore, regarding actual notice, both of these identified issues were moved on by Plaintiffs in their Motion for Summary Judgment on May 20, 2019. [*See* Plaintiffs' MSJ, at 10-13, 16-17, Dkt. 19]. Defendants did not object to the inclusion of the issues as outside the scope of the Complaint, and instead responded to them. [*See* Defendants' Response, at 3-8, 18-20, Dkt. 21].

If Defendants believed Plaintiffs did not correctly assert their claims, Defendants should have brought a Motion for Summary Judgment to dismiss them. In both cases cited by Defendants, *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 908 (9th Cir. 2011) and *Gray v. Cty. of Kern*, 704 Fed. Appx. 649, 650 (9th Cir. 2017) (unpublished), the claims were dismissed on summary judgment. The dispositive dismissal of claims requires the notice and pleading schedule provided in CR 56. Instead, in motion in limine #5, Defendants try to assume the dismissal of the claims by arguing that evidence supporting the claims is not relevant to the case. Such evidence would only be irrelevant if the claims were already dismissed. Defendants had the opportunity to bring its own Motion for Summary Judgment, or to propound discovery to narrow Plaintiffs' assertions, and did neither. Defendants should be deemed to have waived their objection to claims outside the scope of the Complaint.

6) Evidence Regarding Damages Should Be Admitted.

Plaintiffs have two theories for damages (under state statute and federal statute). Under the Title II of the ADA, plaintiffs are entitled to damages if the public entity has "intentionally discriminated" against them, and in the 9th Circuit intentional discrimination for these purposes is defined as "deliberate indifference." This requires only that the public entity have knowledge of the harm that would likely occur and took no action to prevent it. The PFD effectively

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delegated ADA compliance to the Mariners, so there is imputed knowledge based on that delegation. For state law damages, under the WLAD plaintiffs are entitled to damages for "the actual damages sustained by the person" under RCW 49.60.030(2). Plaintiffs should be permitted to present evidence supporting their claims for damages under both theories.

III. CONCLUSION

Defendants' motion should be denied in part and rulings reserved in part.

DATED September 17, 2019, at Seattle, Washington.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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